

The Legal Consequences of Constitutional Court Decisions in Belgium – Judgments in cases of actions for annulment¹

Prof. Dr. Luc LAVRYSEN & Dr. Ann-Sophie VANDAELE

1. Introduction

The Belgian Constitutional Court is a Court that is specialised in constitutional review of federal and regional legislation and to which ordinary courts, including both the Council of State and the Court of Cassation, have to refer when such questions arise before them. Its first competence is to check whether the federal parliament and the parliaments of the regions and communities respect the repartition of competences between the federal state and the regions and communities, as laid down in the Constitution and in some Special Acts that constitute constitutional law in the broader sense. Its second competence is to check whether the various acts of federal and regional parliaments respect fundamental rights. It is important to note that the Constitutional Court has adopted a broad interpretation of its jurisdiction, especially in relation to the review of compliance with the equality principle, and later on, in relation to other fundamental constitutional rights. From the outset, it has involved all other provisions of the Constitution, as well as international and European law in its review.

The Constitutional Court is exclusively competent to review domestic legal norms that have force of law. By domestic legal norms having force of law are meant both substantive and formal rules adopted by the federal parliament (statutes or federal acts of parliament) and by the parliaments of the communities and regions (decrees and ordinances). All other legal norms of an executive nature, such as royal decrees, decrees of governments of communities and regions, ministerial decrees, regulations and decrees of provinces and municipalities, as well as court judgments fall outside the jurisdiction of the Court. The review of these lower legal norms for compliance with international treaties, the Constitution or statutory law falls within the jurisdiction of the ordinary courts and the Council of State (the Supreme Administrative Court). Also the review of other forms of conduct of public or private persons falls outside the Court's competence, as well as the related adjudication of disputes.

The Constitutional Court mainly reviews the constitutionality of the legislative norms in two scenarios. The first scenario, which will be discussed by my colleague Judge NIHOUL, concerns questions referred to the Court by ordinary courts who are confronted with a constitutionality question in the course of their own proceedings. The second, which will be discussed by me, is the annulment procedure, where several institutional parties, as well as any interested person, can ask for the annulment of a newly adopted legislative norm, within 6 months of its publication in the Official Gazette.

The consequences of a decision in an annulment procedure are situated on several levels.² In this presentation, I will discuss the normal consequences of an annulment for the legal norm

¹ Paper for the Trilateral Meeting between the Czech, Latvian and Belgian Constitutional Courts, Brussels 10-13 June 2019.

in question, for judicial and administrative decisions based on the norm, and for potential compensation claims based on an unconstitutionality. Afterwards, I will discuss the options the Court has to mitigate all or some of these consequences, options that are similar to the ones my colleague is discussing concerning preliminary questions. First however, we all know that, luckily for the state of our legal system, not all procedures result in an annulment. When a case is totally or partially rejected, the decision is binding for the other courts within the legal system, regarding the answered questions. Practically this means they no longer have to ask preliminary questions that are identical to the points that have been answered in the rejection decision.

2. Consequences for the legal norm and the legislator

When the Court finds an unconstitutionality in the course of an annulment procedure, the legal norm in question is annulled, which implies its retroactive removal from the legal order. This is the *ex tunc* effect of an annulment decision. It is as if the norm has never existed. This is not without relevance as in around 40 % of the cases the Court annuls contested provisions, but mostly only (very) partially. That also means that most of the time the annulled norm has been applicable for a period of 1,5 to 2 years and that the legal order is disturbed retroactively. As I understand, this is different from for the system of the Czech Republic, as discussed by President RYCHETSKÝ³, in which the annulment occurs as a rule *ex nunc* and it is also different from the Latvian system, where as a rule an unconstitutional norm ceases to have its effects from the date of the publication of the judgment⁴ with all the nuances and variations presented by Justice NEIMANIS⁵.

The annulment also entails a prohibition, for the legislator in question and for other legislators, to adopt an identical legal norm. Incidentally, if other legislators have already adopted identical provisions, the annulment opens a new 6 month period to contest those norms.

Sometimes, no further legislative intervention is required and an annulment as such is enough. A recent example concerns the suspension of the prescription time in civil procedures, in cases in which the Council of State has annulled an executive decision. The Court ruled that the suspensive effect should also apply if a procedure before the Council of State was rejected. By simply eliminating the word “annulled” in the contested provision, we were able

² For an overview: K. Muylle, “Wat kan een rechtspracticus aanvangen met een arrest van het Grondwettelijk Hof? Gevolgen van arresten van het Grondwettelijk Hof in het annulatiecontentieux”, in: P.D.G. Caboor, J. Debièvre, G. Laenen, e.a., *Rechtsbescherming* (Actualia publiekrecht; 1), Brugge, Die Keure, 2008, 159-196.

³ *The effects (legal and temporal) of the Constitutional Court Judgments*, paper presented at the Trilateral Meeting in Brussels on June 11th 2019. According § 70 of Constitutional Court Act: “(1) If, after holding a proceeding, the Court comes to the conclusion that a statute, or individual provisions thereof, conflict with a constitutional act, or that some other enactment, or individual provisions thereof, conflict with a constitutional act or a statute, it shall declare in its judgment that such statute or other type of enactment, or individual provisions thereof, shall be annulled **on the day specified in the judgment**.(...)”

⁴ Section 32 (3) of the Constitutional Court Act: “A legal norm (act) that the Constitutional Court has declared as non-compliant with the norm of a higher legal force, shall be regarded **as not in effect from the day of publication of the Constitutional Court judgment**, if the Constitutional Court has not determined otherwise.”.

⁵ *Legal effects of a judgment of the Constitutional Court*, paper presented at the Trilateral Meeting in Brussels on June 11th 2019.

to create the desired outcome.⁶ Often, however, it takes more than removing certain words from the text of the legal norm, especially when the problem is not so much situated in the text itself, but rather in a “void” or “lacuna”. The Court has used several strategies to ensure a maximum practical effect in these cases. A first strategy consists of avoiding an annulment altogether, by proposing alternative, constitutional interpretations of the contested norm. This way, the norm continues to exist, but can – and of course should – be applied in a constitutional way, without requiring legislative intervention. Similarly, but within the context of a formal annulment, the Court systematically judges that unconstitutional voids that are sufficiently circumscribed, can be filled by judges and the administrations themselves applying the norm in a constitutional compatible way.

When none of these strategies work, or when that are only temporary measures, an intervention by the legislator in question is often necessary. Most legislative assemblies have some kind of reporting system, for instance in the form of a committee charged with the follow up of the Courts decisions. However it does not appear to be amongst the main priorities, and the reaction period of the legislator is highly variable.⁷

Formally, the Court has limited options to enforce its decisions. We are not allowed to impose a certain deadline for legislative intervention, although this can sometimes be remedied by maintaining the effects of the annulled norm for a certain amount of time, to allow the legislator a period of grace that at the same time functions as a deadline. This is however not always possible, especially when the violation of the constitution is due to a void in the text. The Court does not have the power to grant injunctions, let alone impose penalty payments. The Court might of course give an indication, in the course of its appreciation of the constitutionality, of possible avenues for the legislator to solve the problem, but these are not formal injunctions. Additionally, in the case of “follow up preliminary questions” caused by a lack of legislative action, the Court might be able to do something in specific cases, but again, these are not formal means to ensure the effectiveness of the annulment. There are, however, a few measures citizens can take themselves to ensure the effectiveness of the annulment in their specific case, which brings me to the next part of my presentation.

3. The practical realization of the retroactive effects of an annulment

An annulment entails the retroactive disappearance of the unconstitutional legal norm from the entire legal order. In practice, however, the legal norm has often been applied for some time by both the executive and the judicial branch, and its annulment does not automatically annul all these specific applications. The powers of the Constitutional Court are limited to annulling, or, in certain cases, suspending legal norms. We do not have the power to grant compensation, or to adjudicate on the practical consequences of the annulment in specific cases⁸. Therefore, the Special Act on the Belgian Constitutional Court, in its articles 9 to 18,

⁶ Constitutional Court, 28 February 2019, N°. 40/2019.

⁷ H. Vandenberghe, “De beleidsmatige reactie op arresten van het Grondwettelijk Hof”, *CDPK* 2010, 360-375; F. Delpérée, “Le suivi de la jurisprudence constitutionnelle par les Chambres législatives”, *CDPK* 2010, 378-390.

⁸ Contrary to the Czech Court: § 70, 3) of the Constitutional Court Act: “*If the Court annuls a statute, or individual provisions thereof, on the basis of which implementing regulations have been issued, then the Court shall also state in its judgment which of the implementing regulations, or which individual provisions thereof, shall lose force and effect simultaneously with the statute*”.

provides for specific procedures through which parties can apply for the annulment of civil, criminal or administrative judicial decisions based on the unconstitutional norm, within 6 months of the publication of the judgment in the Official Gazette⁹. In all these instances, it is not the Constitutional Court, but the civil, criminal or administrative courts that originally judged the case, which are called upon to withdraw the decision. The annulment also exceptionally opens the possibility of a second appeal before the Court of cassation. Concerning final administrative decisions, all administrative and judicial review options are reopened by the annulment, again with a 6 month deadline.¹⁰

Additionally, or independently of these options, persons who have been confronted with a specific application of the annulled legal norm might consider searching for compensation for damages caused by the unconstitutionality. The idea itself of the liability of the legislator for unconstitutional legal norms has been formally recognized by the Court of Cassation, in a judgement of September 28th, 2006 (*Ferrara Jung*). As it did in the *La Flandria* case in the 1920's on the liability of the executive branch, the Court of Cassation based the concept of liability of the legislator on the general regime of civil liability, requiring a fault, damage, and a causal link between the two. Beyond the principle, however, things are a lot less clear-cut. The liability of the legislator is affected by the controversy that has long existed, and to a certain extent, still exists, concerning the liability of the executive branch, namely the question if the fact that a norm is annulled because it violates a higher norm (be it legal, or, in our case, constitutional) automatically entails that the author is at fault and therefore liable. Regarding the executive branch, the Court of cassation has arrived at a sort of compromise, where the state is liable if the violated norm prescribes or prohibits a specific behaviour, or if the violation amounts to a violation of the general principle of due care. The transposition of this theory to the liability of the legislator for unconstitutional legislation is however, less evident. Some authors claim that in addition to the evaluation the constitutional Court has made in its judgement, the civil judge also has to decide if this evaluation was in some way foreseeable for the legislator in question. An example of a foreseeable violation would be if the legislator reintroduced capital punishment, as this would be an obvious violation of article 14 of the Belgian Constitution, declaring the death penalty abolished. Most constitutional norms however are a lot vaguer, and require more interpretation. Some lower courts have in practice less problems in deciding the annulment implies a fault and therefore a liability, while others apply an additional test based on the due care principle.¹¹

⁹ Eg. F. Judo, "Artikel 18 bijz. Wet. GwH: meer dan een vrome aansporing", *NjW* 2018, 890.

¹⁰ In the Czech Republic, it seems that there is no possibility of revoking final decisions, but that their implementation becomes impossible for the future on the basis of the annulment according § 71 van de Constitutional Court Act: "(1) If, on the basis of a statute or some other enactment which the Court has annulled, a court in a criminal proceeding has passed a judgment which has acquired legal effect but has not yet been enforced, the invalidation of this statute or other enactment shall constitute grounds for reopening the proceeding in accordance with the provisions of the law on criminal judicial proceedings. (2) Other legally effective decisions issued on the basis of a statute, or some other enactment, which has been annulled remain unaffected; however, rights and duties arising from such decisions may not be enforced. (3) The provisions of paragraphs 1 and 2 apply also in cases when a part of a statute or some other enactment, or any of the provisions thereof, is invalidated. (4) Otherwise rights and duties flowing from legal relations created prior to the invalidation of the statute, or other type of enactment, remain unaffected."

¹¹ T. Moonen, « Aansprakelijkheid van de staat voor ongrondwettige wetgeving. Vanzelfsprekend, of niet bepaald? », *CDPK* 2017, 657.

4. Mitigating the effects of an annulment

All of the consequences mentioned before, can be mitigated in specific circumstances. Based on article 8 of the Special Act, the Court can decide to maintain some or all of the effects the annulled norm has had in the past. The Court can also provisionally maintain some or all of the effects that occur after the publication of the annulling judgment, and has done so in several cases, effectively giving the legislator a period of grace to avoid potential chaos between the annulment and the necessary legislative intervention.

In around 25 % of the cases in which the Court annuls, it maintains the effects of the annulled act for a certain period of time or even without a time limit.

The potential chaos created by an annulment is also one of the elements that might justify the exceptional measure of mitigation, as this measure of course entails the preservation of the consequences of an unconstitutional act. The Court cannot, however, single out a specific application of the law in order to maintain its effects: the mitigation is only possible as a general measure. A recent example concerns the so called “*Turteltax*”, a tax imposed on all electricity users in the Flemish Region that was annulled by the Court.¹² The Court maintained the effects of the annulled act for the past and the running fiscal year, because of the practical and legal difficulties relating to a very large number of people reclaiming their contribution.

More generally, the effects of the annulled act can be maintained to protect legal certainty, as the unmitigated effect of an annulment inherently has the risk of disturbing a myriad of established circumstances. The Court takes into account potential financial and economic implications, as well as possible disproportionalities between the benefits and disadvantages of an unmitigated annulment. In practice, it is sometimes very difficult to evaluate the potential consequences of an annulment, and the parties are not always much help in this regard. The defending governments often limits their request for mitigation to a reference to the difficulties the annulment would cause, without going further into detail, by for instance specifying how many decisions, judgements or people would be affected.

Finally a particular problem might occur in case the annulled act is not only unconstitutional, but it also infringing EU law. The Court must in such instance take into account the limitations arising from European Union law (ECJ, Grand Chamber, 8 September 2010, C-409/06, *Winner Wetten*, points 53-69; ECJ, 28 February 2012, C-41/11, *Inter-Environnement Wallonie and Terre wallonne*, points 56-63). As a rule, maintaining the legal effects of national legislation infringing EU law is only possible under the conditions laid down by the Court of Justice in response to a question referred to it for a preliminary ruling.

That is the reason why the Court has in 5 pending cases before the CJEU inserted a particular question on this issue:

“If, on the basis of the answers to the preceding questions, the constitutional court should conclude that the contested law fails to fulfil one of the obligations arising under the abovementioned conventions or directives, and the security of the country’s electricity supply

¹²Constitutional Court 22 June 2017, N° 83/2017.

cannot constitute an imperative reason of overriding public interest permitting a derogation from those obligations, might the Court maintain the effects of the Law of 28 June 2015 in order to avoid legal uncertainty and to allow the environmental impact assessment and public participation obligations arising under those conventions or directives to be fulfilled?”¹³

“Is there an obligation on the Constitutional Court to maintain, on a temporary basis, the effects of the ... provisions to be annulled, as well as those of the provisions which, if necessary, must be annulled in whole or in part, if it follows from the answer to the first or the second question to be referred that those provisions are contrary to EU law, in order to enable the legislature to bring them into line with EU law?”¹⁴

“If, on the basis of the answers to the first or the second question, the Cour constitutionnelle (Constitutional Court) should conclude that the contested law fails to fulfil one or more obligations arising under the provisions referred to in these questions, might it maintain on a temporary basis the effects of the Law of 29 May 2016 on the collection and retention of data in the electronic communications sector in order to avoid legal uncertainty and to enable the data previously collected and retained to continue to be used for the objectives pursued by the law?”¹⁵

“If, on the basis of the reply to the first or second question referred for a preliminary ruling, the Grondwettelijk Hof were to conclude that the contested articles infringe one or more of the obligations arising from the provisions cited in those questions, could it temporarily continue to enforce the effects of Articles 120 and 1262 of the Belgian Wetboek diverse rechten en taken in order to prevent legal uncertainty and to enable the legislature to bring those provisions into conformity with those obligations?”¹⁶

“If the first question is answered in the affirmative, can the Constitutional Court provisionally maintain the effects of Articles 1 and 2 of the law of 8 June 1972 on port labour in order to prevent legal uncertainty and social discontent and enable the legislator to bring them into line with the obligations deriving from European Union law?”¹⁷

We are awaiting judgment in those cases to see how the CJEU is balancing the interest of effective application of EU law with legal certainty requirements.

¹³ Request for a preliminary ruling from the Cour constitutionnelle (Constitutional Court, Belgium) lodged on 7 July 2017 — *Inter-Environnement Wallonie asbl, Bond Beter Leefmilieu Vlaanderen vzw v Conseil des ministres* (Case C-411/17).

¹⁴ Request for a preliminary ruling from the Grondwettelijk Hof (Belgium) lodged on 16 October 2017 — *Belgisch Syndicaat van Chiropraxie and Others* (Case C-597/17).

¹⁵ Request for a preliminary ruling from the Cour constitutionnelle (Belgium) lodged on 2 August 2018 — *Ordre des barreaux francophones et germanophone, Académie Fiscale ASBL, UA, Liga voor Mensenrechten ASBL, Ligue des Droits de l'Homme ASBL, VZ, WY, XX v Conseil des ministres* (Case C-520/18).

¹⁶ Request for a preliminary ruling from the Grondwettelijk Hof (Belgium) lodged on 22 November 2018 — *Anton van Zantbeek VOF; other party: Ministerraad* (Case C-725/18).

¹⁷ Constitutional Court 6 June 2019, N° 94/2019.